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In the Supreme Court of the United States

October Term, 1941

No. 255

WALTER CHAPLINSKY,
Appellant,

vs.

THE STATE OF NEW HAMPSHIRE,
Appellee.

APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

APPELLEE'S BRIEF

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APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S BRIEF

OPINION IN COURT BELOW.

The opinion of the Supreme Court of New Hampshire will be found in 91 N. H.—, 18 A. 2d. 754 (Dec'd Mar. 4, 1941, R. 51-64 inclusive).

JURISDICTION.

Jurisdiction of the Supreme Court of the United States is invoked by appellant under s. 237 (a) of the Judicial Code [28 U.S.C. 344 (a)], and under c. 14 of the Act of Congress of January 31, 1928, 45 Stat. 54, and under c. 440 of the Act of Congress of April 26, 1928, 45 Stat. 466.

Jurisdiction should not be taken in view of the following cases:

Watch Tower Bible & Tract Society v. *City of Bristol*, 305 U. S. 572,

Cantwell v. *Connecticut*, 310 U. S. 296,

Hussock v. *People of the State of New York*, 311 U. S. 659,

Langston v. *South Carolina*, 311 U. S. 685,

Bevins v. *Prindable*, 314 U. S.—, 86 L. Ed. (adv.) 54.

STATEMENT OF THE CASE.

The New Hampshire statute involved here is found in the Public Laws of New Hampshire (1926) c. 378, s. 2, which provides:

> "2. Derisive Words. No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

The complaint against the appellant read as follows: "County of Strafford, aforesaid, with force and arms, in a certain public place in said City of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' the same being offensive, derisive and annoying words and names." (R. 1.)

A verdict of guilty was returned by the jury. (R. 50), and the appellant's bill of exceptions (R. 1-4) was allowed and the law questions raised were transferred to the Supreme Court of New Hampshire. The exceptions were overruled (R. 51, 64) and the statute was held constitutional. The case is here on appellant's petition for appeal (R. 64-67 inclusive) which was allowed. (R. 67-68).

The situation brought out at the trial is not accurately described in appellant's statement of the case. His recital of the facts is based almost exclusively on the testimony of his witnesses. That testimony was contradicted in many respects. Particularly unjustified is appellant's recital on page 3 of his brief: "While appellant was thus engaged in his work, a mob formed around him on the sidewalk, a tumultuous crowd of about fifty or sixty persons objected to his work and threatened him with violence if he did not discontinue."

The facts probably found by the jury can be fairly described in substance as follows:

On Saturday afternoon, April 6, 1940, the appellant was engaged in selling and distributing literature of the sect known as Jehovah's Witnesses, in the public streets (R. 7) of the city of Rochester, particularly at Central Square where traffic was heavy (R. 14) and a lot of people passed by in the course of the Saturday afternoon shopping. (R. 5, 6, 11, 33, 41). Other people were standing as usual about the corner and along the buildings and doing nothing in particular. (R. 14). The appellant announced his literature in terms having a tendency to irritate the people by calling "racketeers" priests and those of their faith. (R. 15, 19). Numerous complaints were made to the City Marshal who warned the appellant that the people were getting into an ugly mood as a result of his public announcements with reference to priests and religion. (R. 6, 9, 10, 11, 12, 15, 16, 19). A short while later the Marshal was advised by

a man passing by in a car that there was what he thought was a riot at the Square. (R. 12, 30). On his way to the point of trouble, he met two officers taking the appellant to the Police Station (R. 12) "more for his protection than for arrest" (R. 54). He reminded the appellant of his earlier warning in the afternoon that the people might get out of hand if he continued using the language he had with reference to their faith and priests. (R. 6, 9, 16, 20). Whereupon the appellant addressed to the Marshal the words described in the complaint (R. 1) and he was placed under arrest. (R. 13, 54).

The evidence concerning the nature of the riot at Central Square is conflicting but all witnesses for the state testified that they did not participate in a riot or in any way provoked, annoyed or abused the appellant. R. passim.

Officer Lapierre observed a number of persons around the appellant who was down on one knee. He went to the scene, picked him up and started with him for the Police Station apparently for his protection. (R. 5, 54). That some disturbance occurred as a result of a salty exchange of epithets between the appellant and a member of the public is not questioned. (R. 16, 18). But that this disturbance amounted to a riot produced by mob action is not borne out by the record.

SUMMARY OF ARGUMENT.

The appellee contends that the statute here involved is not unconstitutional for the following reasons:

The statute has been construed by the state court as a proper subject for the exercise of the state police power, since its aim is the promotion of the social interest in public order. The construction placed by the state court on the statute justifies the appellant's conviction and makes immaterial the evidence of provocation offered by him.

As for the statute, it is not too vague and indefinite since, in the nature of things, all-inclusive legislative description of verbal conduct likely to annoy, deride and offend with resulting breach of peace is well-nigh impossible. Common experience in the context of the life of any given community would indicate to the person of common intelligence what words are annoying, deriding, offensive and likely to cause another person to whom they are addressed to fight.

Nor does the statute violate appellant's right to the free exposition of his ideas, because the verbal conduct it prohibits bears no appropriate relationship to freedom of discussion in the process of attaining and disseminating truth.

POINTS FOR ARGUMENT

POINT ONE.

THE STATUTE AS CONSTRUED BY THE STATE COURT IS A PROPER SUBJECT FOR THE REASONABLE EXERCISE OF THE STATE POLICE POWER AND AS APPLIED TO THE APPELLANT CONSTITUTES AN ADEQUATE AND CONSTITUTIONAL BASIS FOR HIS CONVICTION.

POINT TWO.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANT DOES NOT SET UP AN UNCONSTITUTIONAL STANDARD OF CRIMINALITY IN VIOLATION OF DUE PROCESS.

POINT THREE.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANT DOES NOT DEPRIVE HIM OF HIS RIGHT OF FREEDOM OF SPEECH GUARANTEED BY THE UNITED STATES CONSTITUTION.

ARGUMENT

POINT ONE.

THE STATUTE AS CONSTRUED BY THE STATE COURT IS A PROPER SUBJECT FOR THE REASONABLE EXERCISE OF THE STATE POLICE POWER AND AS APPLIED TO THE APPELLANT CONSTITUTES AN ADEQUATE AND CONSTITUTIONAL BASIS FOR HIS CONVICTION.

The challenged statute may be divided into two parts. One prohibits words and names addressed to another in a public place; the other considers an offense noises or exclamations made with intent to deride, offend, or annoy. The defendant Chaplinsky was charged with, tried and convicted for a violation of the first part of the statute prohibiting offensive, derisive or annoying words in a public place.

The purpose of the statute here in question is to preserve the public peace. See *State* v. *McConnell*, 70 N. H. 294, where the Court said: "The purpose of the act seems to have been to insure to persons freedom in the pursuit of their lawful occupation . . . The purpose . . . was to preserve the public peace . . . " p. 294. . . . "The wound, fear, or spirit of revenge produced by the language does not depend upon the locality where it is used." p. 295. See also *State* v. *Brown*, 68 N. H. 200, where the act was given the same construction. In the *McConnell* case, the complainant was called a "bitch" and other obscene names. In the *Brown* case, the defendant called another a "God damned blackmailer". In both cases, the conviction was upheld by the New Hampshire Supreme Court.

In the case of *State* v. *Brown, supra*, the defense of truth was held inadmissible under the statute, since no distinction was made between truthful and untruthful utterances. This decision also does not require any intent other than that to speak the words prohibited by the statute. That is the construction again adopted by the New Hampshire Supreme Court which said:

> "It thus appears that long before the words for which [fol. 41] Chaplinsky was convicted, the construction of the provision was made plain, to the extent that no words were forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed. This is not a case where, in advance of a judicial interpretation, the defendant could not be bound to understand what was intended by the statute. See, *Lanzetta* v. *New Jersey*, 306 U. S. 451, 456." (R. 53).

That construction is binding on this Court since the highest state court is the final authority on state law. *Minnesota* v *Probate Court*, 309 U. S. 270; *Fidelity Trust Co.* v. *Field*, 311 U. S. 169; *Six Companies* v. *Highway District*, 311 U. S. 180; *West* v. *A. T. & T. Co.*, 311 U. S. 211. That protection of public order is a proper sphere for the exercise of the state police power is too well settled to require a lengthy citation of authorities. See *Thornhill* v. *Alabama*, 310 U. S. 88, and *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 275, where the Court said in substance that a state may legislate against conduct menacing the peace without violating due process.

In applying to the appellant the statute as construed, the Court below took the position that the words used had in fact a clear and present tendency to produce a breach of the peace and that besides they were in and of themselves a breach of the peace. In referring to the appellant's comment addressed to the Marshal, the Court below said "Its plain tendency was to further breach of order, and it was itself a breach of the peace." (R. 54). The Court also held that provocation, if any, could not justify the appellant in violating the statute. The offensive words calculated to cause a breach of the peace, the intent to speak them, addressing them to another person lawfully in the street, being

the elements present, the statute was violated regardless of the truth of the words spoken and irrespective of the provoking circumstances alleged. In this connection the Court below said:

> "The rule thus established is not severe. Chaplinsky could no more defend unlawful speech on the ground of provocation than could one of the street-crowd have defended a charge of calling Chaplinsky names on the ground that the name-caller had been incensed by Chaplinsky's teachings. The defendant was held to the same duties as those who disagreed with him or with whom he disagreed. The rules of fair conduct in public speech in the street apply indiscriminately to all—whether the speaker be a preacher, an official or a mere by-stander." (R. 55).

This applied construction is also binding here since state law does not operate in vacuo but grows out of the facts as found and interpreted by the court below.

That statutes directed against conduct calculated to produce a breach of the peace and considered in and of itself a breach of the peace are within the realm of the state's police power is a proposition overwhelmingly supported by the cases decided by this court. See, *Cantwell* v. *Connecticut*, supra, p. 308, where the court said: "When . . . immediate threat to public safety, peace, or order appears, the power of the state to prevent or punish is obvious."

The words of the appellant were offensive, derisive and annoying within the meaning of the statute. Racketeers are considered persons of anti-social behavior, violators of the law, exploiters, promoters of white slavery, defrauders and what not. Fascists are looked upon in this Nation as persons who achieve their ends by terrorism and resort to might. Both expressions are well calculated to cause a

breach of peace, especially when addressed to an officer in the performance of his duties. Such language can hardly be considered "in any proper sense communication of information or opinion and safeguarded by the constitution" to quote Mr. Justice Roberts in the *Cantwell* case, p. 310. See *Levy* v. *Gelber*, 175 Misc. 746, 25 N.Y.S. 2d. 148, where calling another a "Nazi and Communist" was held slanderous. For cases holding that opprobrious words whether slanderous or otherwise offensive are a breach of peace when addressed to policemen, See 34 A. L. R. 566. Whether the word "racketeer" means illegitimate occupation, trick or dodge, was left to the jury to decide in *Finkle* v. *Westchester*, 256 N.Y.S. 908, 235 App. Div. 817. See also, *State* v. *McGlone*, D. C. Pa. 19 F. Supp. 285, 287, where racketeering was defined as the organized use of threats, coercion, intimidation and use of violence to compel someone to do this or that.

The commendable solicitude for civil liberties evidenced in recent cases of this court is "necessarily limited to situations where the police regulation could be effectively achieved without limiting these liberties." *53 Harv. L. R.* 487, 488 (1940). To be solicitous of the civil liberties of Jehovah's Witnesses on the record in this case is to deny the same solicitude to other people rightfully in the highways and other public places who may demand the right to speak non-offensive and non-opprobrious words to their listeners. Jehovah's Witnesses tend to overlook the fact that their right to speak must necessarily be subject to reasonable regulations allowing all other persons the same rights subject to the same general non-discriminatory regulations making for municipal tranquillity.

It must be remembered that the statute in question here is merely one of the ways provided by the New Hampshire legislature for the punishment of breach of the peace and offenses against the police of towns. Both at common law

in England and in the United States, the state under its police power has been able constitutionally to prohibit offensive language calculated to cause disorder and violence. There is nothing in any decision of this court that gives any countenance to the thought that freedom of speech includes the right to commit verbal crimes or torts at common law. "We can, of course, be sure that certain forms of utterance, which have always been crimes or torts at common law, are not within the scope of the free speech clauses." Chafee, *Freedom of Speech in Wartime*, 32 Harv. L. R. 932, 943 (1919).

The words spoken by Chaplinsky in this case were opprobrious, vituperative, slanderous and offensive. They were also obviously profane and illegal. Public Laws of N. H. (1926), c. 385, s. 2. It was the type of non-informative utterance that was calculated to cause violence and in this case to cause a breach of the peace. It is just such statements that have been condemned by the highest courts of this country for years and years as being punishable by appropriate criminal statutes. We know that a man cannot claim protection under the free speech clause by falsely shouting "fire" in a theater. As Mr. Justice Holmes said in *Schenck* v. *United States*, 249 U. S. 47, 52, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." By the same reasoning the most stringent protection of free speech should not protect Chaplinsky in falsely accusing a police officer in the performance of his duty of offensive false charges which tended to cause disorder and in fact did cause disorder with some possible resulting injury to the speaker of the words. It seems impossible on this record to conceive that Jehovah's Witnesses or any other sect are entitled to disregard those well accepted norms for maintaining municipal peace and order The Constitution of the United States would not indicate

that such a right existed and certainly if it does exist, it should be properly subordinated to the more important, serious and fundamental need of maintaining social order.

POINT TWO.

THE STATUTE AS CONSTRUED AND APPLIED TO THE APPELLANT DOES NOT SET UP AN UNCONSTITUTIONAL STANDARD OF CRIMINALITY IN VIOLATION OF DUE PROCESS.

The test of criminality under the statute is not a subjective one as the appellant claims. Rather is it that the statute contemplates, "what men of common intelligence would understand would be words likely to cause an average addressee to fight." Opinion of the Court below. (R. 62). Such a tendency of any given verbal conduct is "as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." *Minnesota* v. *Probate Court*, supra, p. 274.

In *Nash* v. *United States*, 229 U. S. 373, it was held that the term "every" in the prohibition against every combination, contract or conspiracy in restraint of interstate trade was not so vague as to be inoperative on the criminal side. Mr. Justice Holmes, speaking for the Court, said:

> "It is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men (page 376) . . .
>
> "But, apart from the common law as to restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not

only may he incur a fine or short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor forsaw.' (Cases cited). 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' (Cases cited). If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder however little he expected the result. (Cases cited). If he did no more than drive negligently through a street, he might get off with manslaughter or less."

See also *Bandini Petroleum Co. et al* v. *Superior Court*, 284 U. S. 8. ("Unreasonable waste of natural gas" held not too broad).

Miller v. *Oregon*, 273 U. S. 657, where the Court upheld a statute prohibiting any person from operating an automobile at a rate of speed that will endanger property, life or limb.

Sproles v. *Binford*, 286 U. S. 374, 393, where the Court said: "The use of common experience as a glossary is necessary to meet the practical demands of legislation."

Lloyd v. *Dollison*, 194 U. S. 445, 450, (Liquor restrictions varying according to sale at "wholesale" or "retail").

Waters-Pierce Oil Co. v. *Texas* (No. 1), 212 U. S. 89, 108-111. (Contracts "reasonably calculated" or which "tend" to fix prices).

Omdechevarria v. *Idaho*, 246 U. S. 343, 345, 348. ("Any cattle range previously . . . or . . . usually occupied by any cattle grower").

Hygrade Provision Co. v. *Sherman*, 266 U. S. 497, 501-503. (Meat represented to be "kosher").

United States v. *Alford*, 274 U. S. 264, 267. (Building fires "near any forest or inflammable material).

United States v. *Wurzbach*, 280 U. S. 396. (Receiving contributions for "any political purpose whatever").

United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 81-82. ("Reasonable variations" in weight or measure).

Kay v. *United States*, 303 U. S. 1, 8-9. ("ordinary fees . . . for services rendered").

Gorin v. *United States*, 312 U. S. 19. (Obtaining information respecting the "national defense").

The reports are full of instances where a man is held to the peril of an indictment for conduct which by common law and experience is recognized as forbidden behavior. It is true that the average man cannot be held to the peril of imprisonment for the unwise exercise of his economic or business knowledge which involves so many factors of varying effect such as in the case of *Connally* v. *General Construction Company*, 269 U. S. 385, where the language was "current rate of per diem wages," or of *Cline* v. *Frink Dairy Company*, 274 U. S. 445, where the interpretation of "reasonable profit" was involved, or of *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, where selling at "unreasonably low prices" was thought too vague.

In other words, this Court has laid down a distinction between situations calling for the rule in the *Nash* case and circumstances making the rule in the *Cohen* case applicable. Where the meaning of the statute may be derived from

the common law or common experience, the *Nash* case applies. Where the language has no judicial background and is not grounded in common experience the *Cohen* case obtains.

It is submitted that just as it is impossible to include by specific description in precise and all inclusive definitions, all the acts which fall within the meaning and purpose of the words "trade," "commerce," "trust," "restraint," "monopoly," "reasonable," "wholesale," "usually," "dangerous," and "near," so is it impracticable to require legislative enumeration of all words which might prove annoying, derisive, offensive and calculated to produce a breach of peace in any given community.

With reference to this point, the Court below stated:

> "'The holding of this statute as sufficiently definite is believed to be consistent with the decisions in *Stromberg* v. *California*, 283 U. S. 359, 369 (where the construction given included in the prohibition a fair use of constitutional freedom), in *Herndon* v. *Lowry*, 301 U. S. 242 (where defendants were obliged to exercise the gift of prophecy in order to know the application of the statute), in *Lanzetta* v. *New Jersey*, 306 U. S. 451 (where the defendant did not have the benefit of a permissible construction prior to the act with which he was charged), and in *Thornhill* v. *Alabama*, 310 U. S. 88 (where the prohibition extended to the use of words 'without annoyance or threat of any kind').
>
> "The words 'offensive,' 'derisive' and 'annoying,' in this connection of tendency to disorder in public places, are commonly used and commonly understood. They are not wanting in meaning. [illegible] are used in statements of legal principles by those who are careful of accuracy and definiteness of statement. Thus, 'per-

sonally offensive' language, 'profane, indecent or abusive remarks directed to the person of the hearer', and 'epithets or personal abuse', all of which are caught up in the phrase 'words [fol. 55] likely to produce violence in others.' *Cantwell* v. *Connecticut, supra.* Though general in a sense, such words have commonly accepted popular and legal significance. When one speaks of publicizing 'without annoyance or threat of any kind' (*Thornhill* v. *Alabama, supra*) he is not to be misunderstood, even though 'without just or legal excuse' are words without ascertainable meaning. And so reference to an injunction prohibiting officials from interfering with the right of speakers 'in an orderly and peaceable manner' is definite, because everybody understands what 'orderly and peaceable' means. *Hague* v. *C. I. O.*, 307 U. S. 496, 517. Likewise, any intelligent person may understand the prohibition of our statute as it has always been construed. Equally clear is the phrase 'matter obscene or offensive to public morals', or the phrase 'disorderly conduct' (*Lovell* v. *Griffin*, 303 U. S. 444).

"Finally, no person situated as was Chaplinsky, is left in any forbidden sense to guess what a jury will guess. Neither he nor the jury is faced with uncertainty in any other sense than would be the case if the charge were negligent conduct, where the test is that of average conduct or gross negligence. Our statute deals 'with the actual, not with an imaginary condition other than the facts.' *International Harvester Company*, 234 U. S. 217, 223. And it deals with those facts upon the basis of tendencies of words used face-to-face in public places which are matters of common knowledge and appreciation." (R. 63-64).

POINT THREE.

THE STATUTE AS CONSTRUED AND APPLIED TO APPELLANT DOES NOT DEPRIVE HIM OF HIS RIGHT OF FREEDOM OF SPEECH GUARANTEED BY THE UNITED STATES CONSTITUTION.

First of all, a distinction must be made between legislative action directed against free expression of ideas under the guise of the exercise of state police power and similar action having an appropriate relationship to the safety and order of the state with incidental effect upon the exercise of free speech. Every free speech problem requires us to balance the individual and social interests against some other social interest such, for example, as national defense or public order.

Criminal law is generally directed against acts and actual injuries. Such injuries may result from verbal conduct as well as from overt acts. No one could contest the constitutional validity of the statutes making punishable the use of obscene, profane and libelous language. The listener, reader, or victim is injured and provoked to a breach of the peace by such language. In his recent work on "*Free Speech in the United States*," (1941) Zechariah Chafee, Jr. stated that verbal peace time crimes "are too well recognized to question their constitutional. . . ." (p. 149), and that indecent talk does not "form an essential part of any exposition of ideas," and does "have a very slight social value as a step toward truth which is clearly outweighed by the social interests in our morality of the young, and the peace of mind of those who hear and see." p. 150. "Words of this type," Professor Chafee writes, "offer little opportunity for the usual process of counter-argument. . . . Insults are punished like a threatening gesture, since they are liable to provoke a fight. p. 150.

That principal was recognized in *Cantwell* v. *Connecticut*, *supra*, where the Court said:

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It inclures not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious." p. 308. . . . "One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. *Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution and its punishment as a criminal act would raise no question under that instrument.*" p. 309, 310.

The case at bar is clearly distinguishable from *Lovell* v. *Griffin*, 303 U. S. 444, where the only social interest advanced against that of free speech was the desirability of urban cleanliness. Such a social interest, to be sure, is nothing compared to the social interest in public order and safety involved here. A substantial difference also exists

between the instant case and cases like *Thornhill* v. *Alabama, supra*, and *Cantwell* v. *Connecticut, supra*. In the Thornhill case, the Court found no breach of the peace in the fact that a picketer in the presence of six or eight others simply urged two employees not to go to work. Such publicizing of a labor dispute in a peaceful appeal to persuasion is not language that is condemned by the New Hampshire statute. In the *Cantwell* case, the Court found that the conduct of the appellant did not amount to a breach of the peace because no truculent bearing, discourtesy or personal abuse was found in the evidence reported.

The case at bar resembles more the cases of *Drivers Union* v. *Meadowmoor Co. supra* and of *Cox* v. *New Hampshire*, 312 U. S. 569. In both cases the securing of the social interests in public order and peace was made to prevail over the social interest in free discussion of public subjects. In the *Cox* case, the requirement that a permit be obtained to conduct a parade in the public streets of a city was held not to deprive the paraders from their right to publicize freely their ideas about religion. In the *Drivers Union* case, the Court went even farther. It held that a perfectly constitutional device—peaceful picketing—may become unconstitutional when it is employed to express ideas in the "context of violence".

If free rein is not given to communication of thought against the requirements of public peace and safety, *a fortiori* must the channel of free expression be closed to language which conveys no meaning subject to the usual process of counter-argument, but simply constitutes insults inflicting injury upon the listener. The freedom of discussion guaranteed by the Constitution embraces only "issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, supra, p. 102. The appellant cannot claim that he is engaging in a "free trade in

ideas" when he calls a law enforcement officer a "God damned racketeer and a damned Fascist," nor can he claim for such insults the liberty "to get [them] accepted in the competition of the market." See, Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, 52; *Abrams* v. *United States*, 250 U. S. 616, 630. Free public debate does not yet include name-calling under the wing of its constitutional protection. The "emotive function" of language such as was used by appellant must be distinguished from the "communicative function" of free expression protected by the Constitution. As was stated in the opinion of the Court below:

> "The only competition for acceptance in that market of opinion to be found in this record is this: the defendant admittedly called the Marshal a damned racketeer and Fascist, in exchange, as the defendant says, for the Marshal's calling him a damned bastard. Either appellation, applied directly to the other on the street, would clearly be a breach of the statute. Neither would rise above the level of name-calling. Neither party could expect the other to be persuaded by such language. Neither remark qualifies as peaceful and truthful discussion of matters of public interest. Each invited personal violence and disturbance of the peace, without any observable tendency to enable the bystanders to test the merits of the competitive ideas, if they were ideas. We can see no relationship of such utterances to that freedom of speech which is so acutely desirable if free institutions are to be preserved. Such face-to-face reviling is not remotely necessary in the debate of public questions. It is not argument. It has no persuasive power. Its only power is to inflame, to endanger that calm and useful consideration of public problems which is the protection of free government.

Its tendency is to useless and dangerous disorder in which the object of free speech is lost to view." (R. 56, 57).

To state it another way, if even unabusive language does not enjoy an absolute constitutional immunity, how much less absolute should be the right to use abusive language which always produces a clear and present danger of producing a public disturbance.

It is respectfully submitted that Jehovah's Witnesses erroneously consider the right of free speech as absolute. This finds no constitutional support, either in the past or present decisions of this court. The thought is well expressed by Mr. Justice McKenna in *Schaefer* v. *United States*, 251 U. S. 466, 474, when he said, "Free speech is not an absolute right, and when it or any right becomes wrong by excess is somewhat elusive of definition." That free speech is relative and is subject to some limitations is acknowledged in *Schneider* v. *State*, 308 U. S. 147, 160-161. We know that the manner of exercising the right of free speech may be regulated although not suppressed. *Cox* v. *New Hampshire*, 312 U. S. 569. We know that free speech does not include the right to "resort to epithets or personal abuse." *Cantwell* v. *Connecticut*, 310 U. S. 296, 309-310. We also know that other civil liberties may be properly subordinated to the more fundamental need for national unity. *Minersville School District* v. *Gobitis*, 310 U. S. 586. All of these cases clearly demonstrate the proposition that freedom of speech is relative and not absolute. It also demonstrates the proposition that a slight general non-discriminatory regulation of free speech is inferior to some other right of greater social value such as municipal order on streets and public highways.

The appellant in asserting his rights of free speech should not do so at the expense of the rest of the community who

are required to exercise this right in a non-criminal manner. The appellant should not be allowed to use profane and slanderous words and commit other torts in exercising his civil liberties. Nor should he be allowed the right to commit a breach of the peace or a violation of a non-discriminatory penal statute having a reasonable tendency to protect and foster municipal order and peace in public places. In times of stress civil rights are perhaps of greater importance because of the tendency to overlook their enduring and fundamental value. But it cannot be denied that civil rights in times of stress can only be protected by an orderly enforcement of the law. See, Attorney General Biddle in *"Civil Rights in Times of Stress,"* 2 Bill of Rights Review 13, 22 (1941).

The State of New Hampshire has not attempted in this case to deprive the appellant of any of his civil liberties. We have taken the position that neither he nor anyone else will be able to enjoy these liberties if they are to be exercised unlawfully and without any regard to the corresponding rights of their fellow citizens. On the record in this case, it would be proper to say that the "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri K. & T. R. Co. v. May*, 194 U. S. 267, 270.

CONCLUSION

In appraising and balancing the social interest in essential free expression against the social interest in the none-less-essential public order and peace, it is respectfully submitted that New Hampshire's power to condemn name-calling in the public streets should be made to prevail over the appellant's interest in calling a city marshal a "God damned racketeer and a damned Fascist." These words obviously are abusive, offensive and are genuinely calculated, as intended by the appellant, to annoy, offend and deride. Such words

were reasonably calculated to cause a breach of the peace and did in fact result in a breach of the peace. If by some test not yet known the words spoken by the appellant to a law enforcement officer are not derisive and offensive, they certainly have no tendency to please anyone going lawfully about his business on public streets.

While it is of great importance for the survival of Democratic institutions that civil liberties be preserved, it is equally essential for the very assurance of such civil liberties that those Democratic institutions themselves be maintained in an atmosphere of public order and peace. See, 1 *Bill of Rights Review*, 310, 312 (1941). Freedom of expression would be illusory without the corresponding stability of public peace. If appellant's civil liberties are to be protected for him, they must be safeguarded by his government whether federal, state or local. It is for the legislature or the court to say how far is too far in determining the limits of free speech in a civilized community.

Respectfully submitted,

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December 27, 1941.

SUPREME COURT OF THE UNITED STATES.

No. 255.—October Term, 1941.

Walter Chaplinsky, Appellant, *vs.* State of New Hampshire. } Appeal from the Supreme Court of the State of New Hampshire.

[March 9, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, Section 2, of the Public Laws of New Hampshire:

"No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

The complaint charged that appellant "with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' the same being offensive, derisive and annoying words and names".

Upon appeal there was a trial de novo of appellant before a jury in the Superior Court. He was found guilty and the judgment of conviction was affirmed by the Supreme Court of the State. 91 N. H. —, 18 A. 2d 754.

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket". Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way they encountered Marshal Bowering who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint with the exception of the name of the Deity.

Over appellant's objection the trial court excluded as immaterial testimony relating to appellant's mission "to preach the true facts of the Bible", his treatment at the hands of the crowd, and the alleged neglect of duty on the part of the police. This action was approved by the court below which held that neither provocation nor the truth of the utterance would constitute a defense to the charge.

It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action". *Lovell* v. *Griffin*, 303 U. S. 444, 450.[1]

[1] See also Bridges v. California, 314 U. S. —, decided December 8, 1941; Cantwell v. Connecticut, 310 U. S. 296, 303; Thornhill v. Alabama, 310 U. S. 88, 95; Schneider v. State, 308 U. S. 147, 160; De Jonge v. Oregon, 299 U. S. 353, 364; Grosjean v. American Press Co., 297 U. S. 233, 243; Near v. Minnesota, 283 U. S. 697, 707; Stromberg v. California, 283 U. S. 359, 368; Whitney v. California, 274 U. S. 357, 362, 371, 373; Gitlow v. New York, 268 U. S. 652, 666.

Appellant here pitches his argument on the due process clause of the Fourteenth Amendment.

Freedom of worship is similarly sheltered. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303.

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. We turn, therefore, to an examination of the statute itself.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances.[2] There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.[3] These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[4] It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[5] "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell* v. *Connecticut*, 310 U. S. 296, 309-310.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. It has two provisions—the first relates to words or names addressed to another

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[2] Schenck v. United States, 249 U. S. 47; Whitney v. California, 274 U. S. 357, 373 (Brandeis, J., concurring); Stromberg v. California, 283 U. S. 359; Near v. Minnesota, 283 U. S. 697; De Jonge v. Oregon, 299 U. S. 353; Herndon v. Lowry, 301 U. S. 242; Cantwell v. Connecticut, 310 U. S. 296.

[3] The protection of the First Amendment, mirrored in the Fourteenth, is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication. Near v. Minnesota, 283 U. S. 697, 714-715.

[4] Chafee, Free Speech in the United States (1941), 149.

[5] Chafee, *op. cit.*, 150.

in a public place; the second refers to noises and exclamations. The court said: "The two provisions are distinct. One may stand separately from the other. Assuming, without holding, that the second were unconstitutional, the first could stand if constitutional." We accept that construction of severability and limit our consideration to the first provision of the statute.[6]

On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed".[7] It was further said: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without the disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker—including 'classical fighting words', words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. Cf. *Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *Thornhill* v. *Alabama*, 310 U. S. 88, 105. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute

[6] Since the complaint charged appellant only with violating the first provision of the statute, the problem of Stromberg v. California, 283 U. S. 359, is not present.

[7] State v. Brown, 68 N. H. 200; State v. McConnell, 70 N. H. 294.

punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. Cf. *Fox* v. *Washington*, 236 U. S. 273, 277.[8]

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damn racketeer" and "damn Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[8] We do not have here the problem of Lanzetta v. New Jersey, 306 U. S. 451. Even if the interpretative gloss placed on the statute by the court below be disregarded, the statute had been previously construed as intended to preserve the public peace by punishing conduct, the direct tendency of which was to provoke the person against whom it was directed to acts of violence. State v. Brown, 68 N. H. 200 (1894).

Appellant need not therefore have been a prophet to understand what the statute condemned. Cf. Herndon v. Lowry, 301 U. S. 242. See Nash v. United States, 229 U. S. 373, 377.